NO. 22745

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH JAMES WELLS,

Appellant,

v.

WALTER CRAVEN, Warden,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLEE'S BRIEF

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TOPICAL INDEX

LIST OF AUTHORITIES CITED

LIST OF AUTHORITIES CITED (Continued)

LIST OF AUTHORITIES CITED (Continued)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH JAMES WELLS, Appellant, v. WALTER CRAVEN, Warden, Appellee.	NO. 22745 APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus by a state prisoner. 28 U.S.C. § 2241(a)(c)(3). Such a petition was filed by appellant on January 23, 1968, in the United States District Court in San Francisco. (Cl. Tr. p. 2.)

This court has jurisdiction to review on appeal a final order of a district judge denying a writ when a certificate of probable cause has been issued. 28 U.S.C. § 2253. An order denying appellant's petition for a writ of habeas corpus was filed on February 8, 1968, and entered on February 12, 1968. (Cl. Tr. p. 40.) An order granting a certificate of probable cause and granting appellant permission to proceed in forma pauperis was issued by the court below on February 26, 1968. (Cl. Tr. p. 84.)

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STATEMENT OF THE CASE

In 1948 appellant was charged with violation of section 288 of the California Penal Code for misconduct with a five year old girl. A preliminary hearing was held on June 25, 1948. (Cl. Tr. p. 18.) On July 13, 1948, appellant entered a plea of not guilty and not guilty by reason of insanity. (Cl. Tr. p. 50.) On August 25, 1945, with appellant present, by stipulation of his counsel, his plea was changed to guilty and a prior felony conviction for burglary and grand theft, for which he served a term of imprisonment, was admitted. (Cl. Tr. p. 51.) Criminal proceedings were suspended and appellant was adjudged to be a sexual psychopath and committed to a state hospital. After a year and a half in the hospital, appellant was granted probation. In 1951, by reason of his misconduct with two small girls, probation was revoked and petitioner was sentenced to state prison. His appeal from this judgment on the ground that he should have had another psychiatric hearing when probation was revoked pursuant to section 5501(c) of the California Welfare and Institutions Code was unsuccessful. In re Wells, 67 A.C. 901, 434 P.2d 613, 64 Cal. Rptr. 317 (1967); People v. Wells, 112 Cal. App. 2d 672, 246 P.2d 1023 (1952).

Appellant was paroled in 1960. In November 1960 he pleaded guilty to child molestation (Cal. Pen. Code § 647a), his parole was revoked, and he was sentenced to state prison, the term to run concurrently with the unexpired portion of the prior conviction. No appeal was taken. A

later collateral attack on the 1948 conviction through state habeas corpus proceedings failed. In re Wells, supra.

STATEMENT OF FACTS

(There was no evidentiary hearing below. The facts herein referred to are supplied by allegations in the petition, various documents in the state court records in cases involving the appellant, and opinions of the California Appellate and Supreme Courts.)

APPELLANT'S CONTENTIONS

The Appellant's Opening Brief contains a number of contentions and arguments which, it is hoped, may fairly be summarized as follows:

1. Errors relating to the June 25, 1948 preliminary hearing
   a. The appellant was entitled to the assistance of counsel at the preliminary hearing since it was a "critical stage."
      (1) Counsel-assisted cross-examination at the preliminary hearing was necessary to attack inaccurate prosecution testimony given by a hostile witness.
      (2) Counsel-assisted cross-examination was necessary to show that a misdemeanor, and not a felony, was committed.

(3) Appellant remains incarcerated, 20 years later, as a result of the testimony presented at the preliminary hearing.

b. The appellant's right to counsel and his right to confront witnesses against him were abridged regardless of whether the preliminary hearing was a "critical stage."

c. The failure of the appellant to be advised of his rights and to be supplied with counsel violated the California Constitution and therefore violated due process of law.

2. The August 25, 1946 proceeding

a. Due process was violated because appellant never personally and knowingly pleaded guilty to violation of section 288 of the California Penal Code.

(1) The state should be held responsible for failing to provide a transcript which would show this fact since appellant requested the preparation of such a transcript in a motion to augment the record in his 1952 appeal.

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b. The stipulated plea of guilty violated appellant's right to jury trial and violated section 1018 of the California Penal Code.

c. Appellant's representation by counsel was inadequate.

3. The November 1960 proceeding

a. The failure of the trial court to order a new psychiatric hearing as required by section 5501(c) of the California Welfare and Institutions Code meant it acted in excess of its jurisdiction and in violation of due process.

SUMMARY OF APPELLEE'S POSITION

The appellee controverts the foregoing contentions.

ARGUMENT

I

THERE WERE NO ERRORS COMMITTED IN CONNECTION WITH THE JUNE 25, 1948 PRELIMINARY HEARING WHICH WARRANT FEDERAL HABEAS CORPUS RELIEF

A. The Preliminary Hearing Was Not a Critical Stage in the Criminal Process and Appellant Was Not, Therefore, Deprived of His Right to Counsel Therein

Appellant contends that in his case the preliminary hearing was a critical stage in the criminal proceedings against him because he was not given the right of personal or counsel-assisted cross-examination, which was necessary to

attack inaccurate testimony given by a hostile witness and to show that only a misdemeanor rather than a felony was committed, and because he remains incarcerated, almost 20 years later, as a result of unchallenged testimony presented at the preliminary hearing. (App. Op. Br. pp. 3-4; Cl. Tr. p. 18.)

Even accepting his version of the facts, federal habeas corpus relief is not warranted.

> ". . . California'a preliminary examination is not, in and of itself, a critical stage in the judicial proceedings such as to constitutionally require the appointment of counsel. An unrepresented accused cannot plead guilty at such an examination and no incriminating statements made by him at such time can be used against him at a subsequent trial. No defenses which might be asserted at a subsequent trial can be lost at a preliminary examination. 'The test is whether that proceeding and what occurred thereat may adversely and prejudicially affect his defense to the charge in a subsequent trial.'" Wilson v. Harris, 351 F.2d 840, 844 (9th Cir. 1965), cert. denied, 383 U.S. 951 (1966).

Appellant's June 25, 1948 preliminary hearing was not a critical stage within the above definition. He does not allege that, had he so desired, he could not have used cross-examination and the assistance of appointed counsel

to challenge prosecution witnesses or show the alleged true nature of the crime committed at a later stage. The superior court record shows that he instead entered a plea of guilty at his trial of August 25, 1948.[1/] (Cl. Tr. p. 51.)

His subsequent incarceration would appear, therefore, to be the result of appellant's decision to admit his crime rather than to anything inevitably following from the preliminary hearing. It is appellant's burden, in order to establish that the preliminary hearing was a critical stage, to show that either there was a likelihood of later prejudice due to the failure to appoint counsel or that actual prejudice resulted therefrom. Wilson v. Harris, 351 F.2d 840, 844-45 (9th Cir. 1965), cert. denied, 383 U.S. 951 (1966); see also Chester v. California, 355 F.2d 778, 780 (9th Cir. 1966). At any rate, any defects in the preliminary hearing were waived by appellant's subsequent guilty plea. Resor v. Rodriguez, 373 F.2d 20, 22 (10th Cir. 1967).

B. The Asserted Denial of the Right to Cross-Examination and Denial of Counsel at the Preliminary Hearing Did Not Violate Appellant's Rights Because Such Asserted Errors Were Not Necessarily Harmful to Him or Contributory Toward His Conviction

Based on his interpretation of the language in the sixth amendment, the appellant contends that the right to counsel and right of confrontation apply in "all criminal prosecutions," that preliminary hearings are "criminal

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1. Issues relating to this plea and proceeding will be discussed in Part II, pages 13-17, of Appellee's argument, infra.

prosecutions," and that therefore he was entitled to these rights at his preliminary hearing whether or not it was a critical stage. (App. Op. Br. p. 4.)

The sixth amendment's right to counsel, as applied to the states through the due process clause of the fourteenth amendment, has been held by the Supreme Court to apply to the "critical stage" of criminal proceedings. White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961). Parts of state criminal processes of merely a preliminary, formal, or nonbinding character clearly appear to have been viewed by both federal and state courts to be sufficiently detached from potentially conviction-pronouncing or sentence-imposing proceedings so as not to come within the traditional coverage of "criminal prosecutions" within the meaning of the sixth amendment. See, e.g., Chester v. California, 355 F.2d 778, 780 (9th Cir. 1966); United States v. Fay, 231 F. Supp. 387, 389 (S.D.N.Y. 1964); In re Van Brunt, 242 Cal. App. 2d 96, 103, 51 Cal. Rptr. 136, 141 (1966), disapproved on other grounds, In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967).

While the courts have not appeared to approach the problem of the maturation of the right of confrontation and cross-examination in terms of a critical stage analysis, a reading of the leading Supreme Court decisions on state-denied confrontation has led appellant to submit that a similar approach is called for. In Pointer v. Texas, 380 U.S. 400 (1965), testimony given by a prosecution witness

at the preliminary hearing, where lack of counsel effectively deprived the defendant of the opportunity for cross-examination, was admitted at the subsequent trial under the former testimony exception to the hearsay rule when the witness proved to be unavailable. This was held to violate the right of confrontation. Douglas v. Alabama, 380 U.S. 415 (1965), involved the reading in the presence of the jury, under the guise of cross-examination of petitioner's alleged accomplice, of a purported confession of the latter which implicated petitioner. The accomplice continually asserted the privilege against self-incrimination and thus denied petitioner an opportunity for cross-examination. In Barber v. Page, 36 U.S.L.W. 4329 (U.S. Apr. 23, 1968), the use at a trial of testimony given in the preliminary hearing was held to violate the right of confrontation since Oklahoma made no attempt to obtain the presence of the witness, who was incarcerated in a federal prison in Texas.

The common denominator and, it is submitted, key factor, in all three decisions was the actual use of potentially damaging evidence against a defendant, which evidence might have been rendered less harmful or have been negated had the defendant been given the opportunity for effective cross-examination of the declarant. That key factor is absent here. There is no indication that any testimony given at the preliminary hearing was used against the appellant at his trial. Instead of causing the prosecution to call its witnesses and present its case on August 25, 1948, at which

time petitioner had the services of court-appointed counsel to conduct cross-examination, petitioner instead chose to enter a plea of guilty. No testimony given at the preliminary hearing was introduced against him. (Cl. Tr. p. 51.) There is, therefore, a complete lack of any showing that the asserted lack of opportunity to cross-examine at the preliminary hearing caused or contributed to the judgment of conviction.

c. The Asserted Failure of the Minicipal Court to Advise Appellant of His Right to Counsel Or to Appoint Counsel, Allegedly in Violation of the California Constitution, Does Not Warrant Federal Habeas Corpus Relief, Especially Since Appellant Deliberately Bypassed His State Remedy Therefor

Appellant contends that sections 8 and 13 of article I of the California Constitution were not followed when he was not advised of his right to counsel and no counsel was appointed for him at the preliminary hearing, and that this violation of state law itself constituted a violation of due process. (App. Op. Br. pp. 4-5; Cl. Tr. p. 18.)

It should first be noted that if the proposition were accepted that a state violates the due process clause of the fourteenth amendment whenever it incarcerates a person following a conviction obtained in criminal proceedings which contained violations of the state's own law, almost every state appeal would involve a federal question. It seems clear that such a result and its consequent burden on the federal court system was never intended by Congress or the courts. Only if such errors are shown to be "so conspicuously prejudicial as to deprive the defendant of a fair trial" is

federal habeas corpus relief available. United States v. Maroney, 373 F.2d 908, 910 (3rd Cir. 1967); see Beasley v. Pitchess, 358 F.2d 706, 707 (9th Cir. 1966); Reid v. Bannon, 234 F.2d 654 (6th Cir. 1956); United States v. Wolfe, 232 F. Supp. 85, 97 (S.D.N.Y. 1964); Johnson v. Crouse, 224 F. Supp. 864, 867 (D. Kan.), aff'd., 332 F.2d 417 (10th Cir.), cert. denied, 379 U.S. 866 (1964). Since the appellant did have counsel at the time and place set for trial (Cl. Tr. p. 51), any errors with respect to appointment of or advisement as to the right to counsel at the preliminary hearing, especially in light of appellant's guilty plea, not only were not serious enough to deprive him of a fair trial but should be considered inconsequential.

A second compelling reason for denying relief is that appellant deliberately bypassed an adequate and easily invoked state remedy for the alleged errors at the preliminary hearing. Under sections 995 and 996 of the California Penal Code, appellant's proper course of action was a motion to set aside the information. Although represented by counsel, appellant failed to pursue this remedy and thus waived his right to question the legality of his commitment under state law. In re Wells, 67 A.C. 901, 903, 434 P.2d 613, 614-15, 64 Cal. Rptr. 317, 318-19 (1967).

Counsel's decision to bypass established state remedies, even if there was no prior consultation with the defendant, when done as part of trial tactics or strategy, precludes the defendant from asserting constitutional claims based on possible damage resulting from such a

decision. Nelson v. California, 346 F.2d 73, 80-81 (9th Cir.) [interpreting Henry v. Mississippi, 379 U.S. 443 (1965), and Fay v. Noia, 372 U.S. 391 (1963)], cert. denied, 382 U.S. 964 (1965). This was clearly such a strategic or tactical decision by counsel. A successful motion under section 995 of the California Penal Code would not bar further prosecution or a new preliminary hearing. In re Van Brunt, 242 Cal. App. 2d 96, 108, 51 Cal. Rptr. 136, 144 (1966), disapproved on other grounds, In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967). Further proceedings following a successful motion might have seemed to counsel likely to produce more damaging evidence against appellant, possibly leading to conviction of more than one offense or leading to little chance of leniency. Choosing instead to enter a plea of guilty would also have the potential advantage of securing to counsel's indigent client psychiatric examination within the shortest possible time. The California procedure in question, as the state's highest court stated in People v. Harris, 67 A.C. 893, 898 & n.3, 434 P.2d 609, 611-12 & n.3, 64 Cal. Rptr. 313, 315-16 & n.3 (1967), serves a legitimate state interest in the administration of justice, and thus the failure to pursue it constitutes an intentional bypass or waiver within the meaning of Henry v. Mississippi, 379 U.S. 443, 448-452 (1965).

The opinion of the Federal District Court shows that it considered the state court records, including those most relevant to the entering of the guilty plea (Cl. Tr. p. 6), and that therefore its ruling that

counsel's decision did not violate appellant's constitutional rights was an independent determination. See, e.g., Lessard v. Dickson, ___ F.2d ___, (9th Cir., Apr. 17, 1968); Nelson v. California, 346 F.2d 73, 77 (9th Cir.), cert. denied, 382 U.S. 964 (1965).

II

NO DEPRIVATIONS OF APPELLANT'S RIGHTS WARRANTING FEDERAL HABEAS CORPUS RELIEF OCCURRED AT THE AUGUST 25, 1948 PROCEEDING

Appellant argues that he never personally and knowingly pleaded guilty to violation of section 288 of the California Penal Code, that the guilty plea entered by his counsel violated both his right to jury trial and section 1018 of the California Penal Code, and that his representation by counsel was inadequate. He urges that "the State should be held responsible" for failure to produce a reporter's transcript of the August 25 proceedings. (App. Op. Br. pp. 5-6; Cl. Tr. pp. 12-13, 16-17.)

Despite the diligent efforts of appellee's attorneys, no transcript of the August 25, 1948 proceedings could be obtained. (Cl. Tr. pp. 69-71.) The main cause for this undoubtedly is the passage of time between the plea and the pursuance of post-conviction relief. Appellant claims that a request to augment the record with "all necessary documents and papers" was denied during his 1952 appeal. (App. Op. Br. pp. 5-6.) This contention is not correct. The documents forwarded by appellee to the Federal District Court include a request to the state appellate court for augmentation of

the record (a copy of which is attached as an appendix hereto). The motion requested inclusion in the record of a probation officer's report and the report of Dr. Hyman Tucker. As a reason for the motion, the last paragraph stated that "all necessary papers and documents" be before the court. No mention whatsoever was made of a transcript of the August 25, 1948 proceedings.

The situation here (a 19-year delay) lends strong support to the proposition that permitting unlitigated constitutional questions to lie dormant for years and then be litigated through a habeas corpus petition "does not further the administration of justice." Earley v. United States, 263 F. Supp. 522, 527 (C.D. Cal. 1966), aff'd, 381 F.2d 715 (9th Cir. 1967). As has been held where a federal offense was involved, one who delays so long after the trial court proceedings to attack his guilty plea "must carry a heavy burden to overcome the regularity of his conviction." Pasley v. Overholser, 282 F.2d 494, 495 (D.C. Cir. 1960). The inadequately explained failure to raise this issue for 19 years would, it is submitted, be a basis for concluding that petitioner has deliberately bypassed, abandoned, and waived the point. While the "injury" done to him may not grow stale, the ability to decide what happened does, as does the ability to retry the case, so that some slight degree of compulsion to raise his claims in a timely way is warranted. 2/

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2. The lack of an adequate explanation for the 19 year delay serves to distinguish and render inapplicable hereto decisions allowing habeas corpus relief despite long delays. In Fay v. Noia, 372 U.S. 391, 439-40 (1963), the petitioner

In Norvell v. Illinois, 373 U.S. 420 (1962), it was held that where an accused had the services of counsel at trial and presumably for appeal, yet failed to pursue an appeal, and where due to the death of the court reporter no trial transcript was available, the state, in applying the requirement of supplying transcripts to indigent appellants, may deny relief without violating due process or equal protection. In the instant case, since the lack of a transcript is not due to fault of the state and since appellant also had counsel, the state also should be allowed to deny relief though a transcript may be important to a proper determination of the issues raised. The available records, the minutes of the superior court, show that appellant withdrew his previous plea of not guilty and not guilty by reason of insanity and "regularly enters [entered]" a plea of guilty. (Cl. Tr. p. 51.) There is no indication that the court acted

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2. (Cont'd)
did not appeal his conviction in 1942 because under existing state law he was faced with a "grisly choice" -- if his appeal proved successful, a new trial could result in the death penalty. The petitioner in Palmer v. Ashe, 342 U.S. 134 (1951), had at one time been committed to a state hospital because he was an "Imbecile"; he alleged that he had never received advice as to or the assistance of counsel, and that the prosecution had deceived him as to the nature of the crime to which he pleaded guilty. In Uveges v. Pennsylvania, 335 U.S. 437 (1948), there was an alleged lack of assistance of, and advice as to, counsel between the arrest and the conviction, and a charge that the petitioner's guilty plea had been coerced through threats made by the prosecutor. Herman v. Claudy, 350 U.S. 116 (1956), also involved the issue of total lack of counsel and of advice pertaining to the right to counsel. No such explanations for delay appear in the instant case. Appellant had the services of counsel when he entered his guilty plea. (Cl. Tr. p. 51.) Appellant was represented by counsel in subsequent judicial proceedings in September of 1948, May of 1950, and January of 1952; at no time was the issue of his allegedly nonpersonal and unknowing guilty plea raised. (Cl. Tr. pp. 52, 53, 65-68.)

contrary to state law (Cal. Pen. Code §§ 859, 1018) by failing to take a personal plea after advising appellant of his rights and the consequences of his actions.

Even if it is assumed hypothetically that appellant did not personally plead guilty and that this violated state law (Cal. Pen. Code § 1018), federal habeas corpus relief would not be warranted unless this asserted error constituted a denial of fundamental fairness. See, e.g., Lisenba v. California, 314 U.S. 219, 236 (1941). Such is not the case. Appellant does not contend that he objected to the entering of the plea. By acquiescing (he does not contend he was not present at the time), he authorized and adopted counsel's action. In re Martinez, 52 Cal. 2d 808, 815, 345 P.2d 449, 453 (1959). Appellant must have known that he was charged with and had pleaded guilty to violation of section 288 of the Penal Code when he was committed to the Mendocino Hospital on September 15, 1948. (Cl. Tr. p. 52.) In May of 1950, with appellant's new counsel present, probation was granted. (Cl. Tr. p. 53.) On January 8, 1952, with appellant and counsel, Mrs. Gladys T. Root, present, appellant was again sentenced for violation of section 288. (Cl. Tr. pp. 65-68.) The court stated that appellant had previously withdrawn a not guilty plea and pleaded guilty to violating section 288. (Cl. Tr. p. 67.) Neither appellant personally nor his counsel raised the issue of the alleged improper guilty plea at this or any other of the above mentioned proceedings.

Nor was his present contention of inadequacy of counsel raised. Asserted inadequacy of counsel does not

present a question warranting federal court relief unless "the service of counsel was of such a caliber as to amount to a farce or a mockery of justice." Grove v. Wilson, 368 F.2d 414, 416 (9th Cir. 1966). As shown in Part I,c, supra, appellant's counsel on August 25, 1948, may have been motivated by valid strategic considerations. "The right to assistance of counsel does not require successful assistance." Nelson v. California, 346 F.2d 73, 81 n. 8 (9th Cir.), cert. denied, 382 U.S. 964 (1965). The August 25 proceeding was in Los Angeles County where appellant was represented by a deputy public defender, whose office has traditionally enjoyed a highly favorable reputation. See, e.g., Wilson v. Gray, 345 F.2d 282, 288 n. 8 (9th Cir. 1965), cert. denied, 382 U.S. 919 (1965); People v. Adamson, 34 Cal. 2d 320, 333, 210 P.2d 13, 19 (1949).

III

THERE WERE NO ERRORS RELATED TO THE NOVEMBER 1960 PROCEEDINGS WARRANTING FEDERAL HABEAS CORPUS RELIEF

Appellant contends that the November 1960 proceeding, involving a violation of section 647a of the California Penal Code, denied him due process of law in that the court acted in excess of its jurisdiction by not following the mandate of section 5501(c) of the California Welfare and Institutions Code and suspending criminal proceedings and ordering a hearing and examination to determine whether appellant was a mentally disordered sex offender.[3] (App. Op. Br. pp. 6-7; Cl. Tr. pp. 4-5, 15.)

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3. Appellant does not appear to contend that there is a

Upon his 1960 conviction, petitioner was sentenced to state prison, the term to run concurrently with that of his prior conviction. His parole from his 1952 commitment was also revoked. In re Wells, 67 A.C. 901, 902, 434 P.2d 613, 614, 64 Cal. Rptr. 317, 318 (1967). This is highly significant in that since such action by the California Adult Authority takes precedence over orders of commitment pursuant to the Welfare and Institutions Code, appellant would be properly returned to prison even if a sexual psychopathy hearing had taken place and regardless of the result thereof. People v. Ballin, 66 Cal. 2d 80, 82, 424 P.2d 333, 334, 56 Cal. Rptr. 893, 894 (1967); People v. Redford, 194 Cal. App. 2d 200, 204-06, 14 Cal. Rptr. 866, 867 (1961); cf. People v. Rummel, 64 Cal. 2d 515, 518, 413 P.2d 673, 675, 50 Cal. Rptr. 785, 787 (1966); People v. Victor, 62 Cal. 2d 280, 294-95, 398 P.2d 391, 400-01, 42 Cal. Rptr. 199, 208-09 (1965). Thus, even if appellant's contention that the lack of sexual psychopathy proceedings invalidated the 1960 sentence were correct, his request for a complete release from custody (Cl. Tr. p. 15) is not well taken since he would still be subject to serve the remainder of his 1948 sentence due to his commission of the criminal act which caused both the revocation of his parole and the instituting of the criminal prosecution.

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3. (Cont'd)
federal constitutional right to commitment as a sexual psychopath rather than to incarceration as a sex offender, and appellee can find no authority establishing such a proposition. Appellant's argument seems rather merely to be a manifestation of the belief that whenever a state violates the letter of its own law it also violates due process.

However, even if the 1960 sentence were the only one he was serving, a failure to follow the statute [Cal. Welf. & Inst. Code § 5501(c)], even if such a violation of state law was itself a violation of the fourteenth amendment, would entitle appellant only to return to the superior court for the ordering of a hearing and examination, and not to discharge from state custody. While there appear to be no federal decisions directly in point, the validity of the foregoing proposition would seem established in light of the closely analogous rule that excessive sentences should be corrected "by appropriate amendment of the invalid sentence by the court of original jurisdiction" and "not by absolute discharge of the prisoner." Bozza v. United States, 330 U.S. 160, 166 (1947); accord, McKinney v. Finletter, 205 F.2d 761, 763 (10th Cir. 1953); Ruben v. Welch, 159 F.2d 493, 494 (4th Cir. 1947), cert. denied, 331 U.S. 814 (1947); McKee v. Johnston, 109 F.2d 273, 276 (9th Cir. 1939), cert. denied, 309 U.S. 664 (1939).

One issue appears to remain -- whether this court should rule that appellant be remanded to the superior court in order that a sexual psychopathy hearing and examination might be had.[4/] However, appellant's request for absolute

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4. In light of Carafas v. LaVallee, 36 U.S.L.W. 4409 (U.S. May 20, 1968), appellee is of the view that the fact state custody of appellant is adequately based on the revocation of his 1952 parole does not prevent federal court determination of the merits of his attack on the 1960 conviction. Appellee's position, rather, is that even if the 1960 conviction were considered invalid, appellant, because of the continued validity of the parole revocation, would not be entitled to be released from state custody.

discharge before the California Supreme Court led to its failure to reach the issues of whether such proceedings would be statutorily or constitutionally in order. In re Wells, 67 A.C. 901, 903-04, 434 P.2d 613, 615, 64 Cal. Rptr. 317, 318 (1967). Appellant is apparently seeking to avoid both criminal punishment and the civil commitment, while the California Supreme Court's apparent position was that at most he would be entitled to consideration for commitment as a sexual psychopath. If he really desires the sexual psychopath commitment he should make this request to the state courts. Consideration by this court is thus prevented by appellant's failure to exhaust available state remedies by seeking a determination of the issue in the state courts. 28 U.S.C. § 2254; see Fay v. Noia, 372 U.S. 391, 419-20 (1963); Brown v. Allen, 344 U.S. 443, 487 (1953).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order denying the motion for a writ of habeas corpus be affirmed.

Respectfully submitted,

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WILLIAM E. JAMES,
Assistant Attorney General
ROBERT F. KATZ,
Deputy Attorney General

By ROBERT F. KATZ
ROBERT F. KATZ,
Deputy Attorney General

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6/6/68

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT F. KATZ

ROBERT F. KATZ
Deputy Attorney General

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KENNETH JAMES WILLS, Defendant and Appellant.	Crim. No. 4830

REQUEST FOR AUGMENTATION OF RECORD

Pursuant to Rule 12(a) of Rules on Appeal, it is hereby suggested to the reviewing court that the record in the above entitled cause be augmented by ordering the transmittal to it of a copy of the report of a probation officer dealing with the violation of probation, as well as a copy of the report of Dr. Hyman Tucker appointed on December 14, 1951, in Superior Court case, Los Angeles No. 120658.

Appellant believes that the inclusion of these reports in the record is necessary for a determination of the cause on appeal for the following reason:

It is the contention of appellant that the trial court erred in refusing to proceed with the hearing on sexual psychopathy. At that time the court had before it the report of the probation officer with respect to the alleged violation of probation. In that report there was contained the statement of Dr. Douglas M. Kelley, a police psychiatri

connected with the Berkeley Police Department and with respect to which a stipulation was entered into in the trial court; also, the trial court in ordering a hearing in sexual psychopathy ordered Dr. Hyman Tucker to make an examination and to report back to the court his findings. Although from the record it appears that report was before the trial court there is no indication in the record as to the actual findings ~~other~~ than his conclusion that the appellant was a sexual psychopath. The appellant believes that in reviewing this matter that all necessary papers and documents should be before this honorable court, and in particular, those two documents referred to above.

Dated this 19th day of May, 1952.

Respectfully submitted,

GLADYS TOWLES ROOT and
HERBERT W. GROSSMAN

By /s/ Herbert W Grossman
Attorneys for Appellant

By the Court:

IT IS SO ORDERED.

Dated this_____day of May, 1952.

_____
Presiding Judge